

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

NO. 77-4046

UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT

THE FLORSHEIM SHOE STORE COMPANY OF
PITTSBURGH, PENNSYLVANIA AND THE
FLORSHEIM SHOE STORE COMPANY OF
MONROE, PENNSYLVANIA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

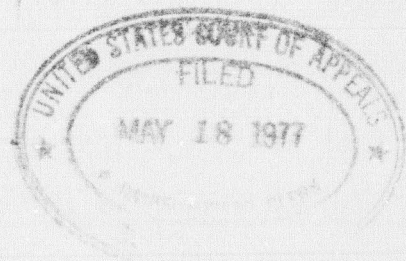
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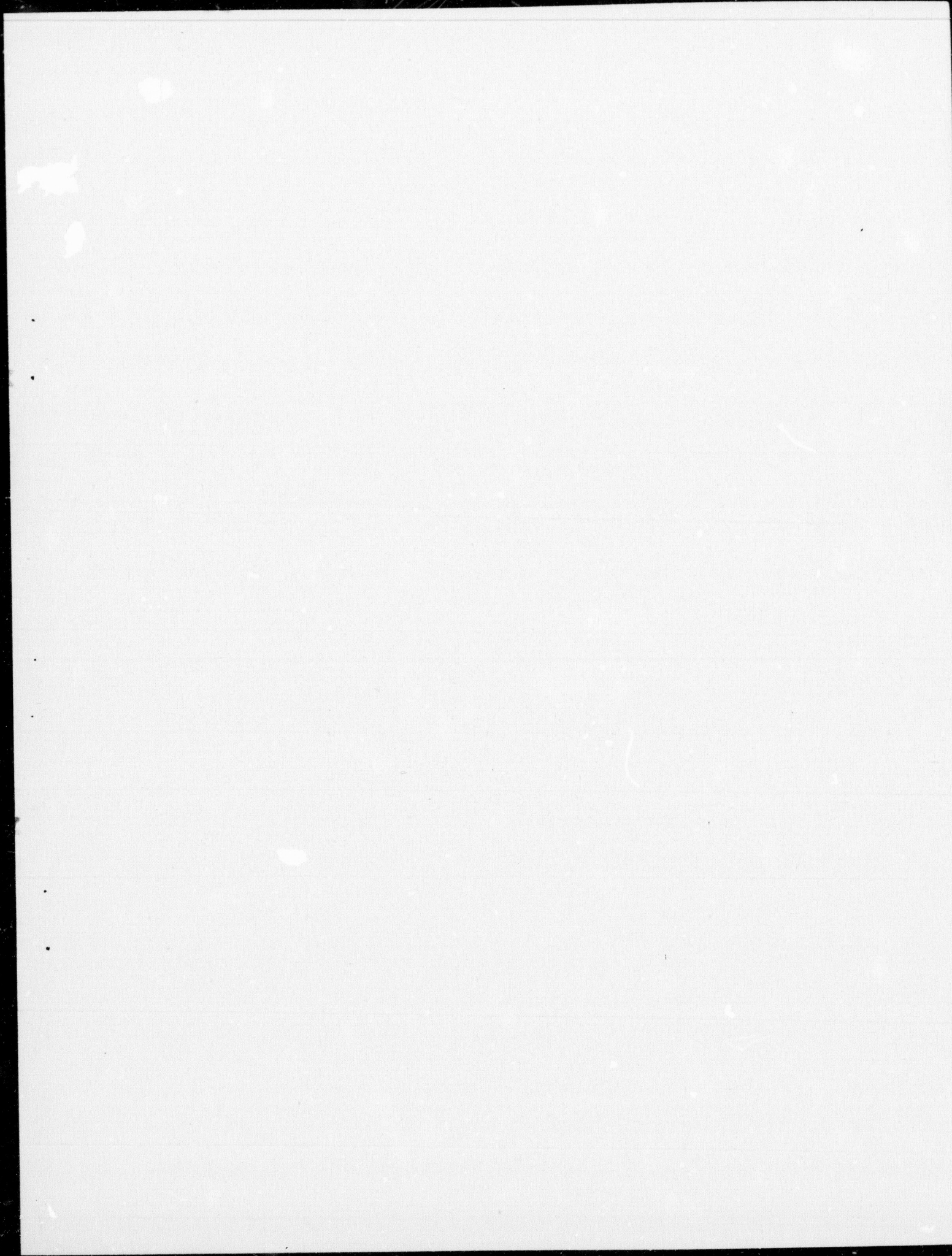
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BRIEF FOR
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COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Company interfered with, restrained, and coerced employees in the exercise of their statutory rights, in violation of Section 8(a)(1) of the Act.

2. Whether substantial evidence on the record as a whole supports the Board's finding that the Company discriminatorily discharged all its

part-time employees as well as full-time employee Ronald Bakowski and discriminatorily transferred George Macko, in violation of Section 8(a)(3) and (1) of the Act.

3. Whether substantial evidence on the record as a whole supports the Board's finding that the Company refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act, and whether the Board's bargaining order is an appropriate remedy for the Company's violations of the Act.

COUNTERSTATEMENT OF THE CASE

This case is before the Court on the petition of The Florsheim Shoe Store Company of Pittsburgh, Pennsylvania and The Florsheim Shoe Store Company of Monroeville, Pennsylvania (herein "the Company") to review and set aside an order of the National Labor Relations Board issued against the Company on January 17, 1977. The Board's decision and order (A. 958-959)^{1/} is reported at 227 NLRB No. 166. The Board has filed a cross-application for enforcement of its order. The unfair labor practices at issue herein occurred at Pittsburgh, Pennsylvania, where the Company is engaged in the retail sale of shoes and clothing accessories. However, this Court has jurisdiction of the proceeding under Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C., Sec. 151 et seq.), as the Company transacts business within this judicial circuit.

^{1/} "A" refers to pages in the Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company violated Section 8(a)(1) of the Act by coercively interrogating employees concerning their union sympathies, activities and membership, and threatening to discharge employees because of their union activities. The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by discharging all of its part-time employees, as well as full-time employee Bakowski, and transferring employee Macko. The Board further found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union^{2/} which represented a majority of its employees in an appropriate unit. The underlying facts upon which the Board based its findings are summarized below.

- A. Background: A majority of the employees select the Union as their collective bargaining representative

The Company operates five retail shoe stores in the Pittsburgh metropolitan area: 200 Fifth Avenue, 501 Smithfield Street, Northway Center Mall, South Hills Village, and Monroeville Mall (A. 925). The Union campaign began at the Monroeville Mall store in March 1975, when Union Agent Best met with employees Osselburn, Macko and Belesky (A. 925; 50). By letter dated August 28, 1975, to H.B. Levine, District Manager,^{3/} the Union asserted majority status in a unit of all full-time and part-

^{2/} Retail Store Employees Union Local 1407 as chartered by Retail Clerks International Association, AFL-CIO.

^{3/} Levine's office is located at the Fifth Avenue store (A. 741).

time selling and non-selling employees, and demanded recognition as the collective bargaining representative in that unit. The Union expressed its willingness "to meet . . . at your earliest convenience" in order to prove its majority status (A. 926; 824). A copy of the August 28 letter was sent to L.G. Brien, the Company's National General Manager, at his Chicago office (A. 926; 826). Also on August 28, 1975, the Union filed a representation petition with the Board (A. 926; 828). On that date, the Union had a majority of at least 14 cards in a unit consisting of 22 employees (A. 942-943; 818, 820, 822, 829, 831, 839, 841, 847, 849, 853, 855, 857, 860, 862). On September 2, 1975, the Union received 3 additional authorization cards (A. 943; 843, 845, 851).

- B. The Company coercively interrogates employees and threatens to discharge them because of their Union activities

On the heels of the Union's demand for recognition, the Company embarked on a systematic campaign of interrogating employees at its various locations.

✓ Early in September, Smithfield store Manager Brower asked part-time employee Scott if he favored the Union; whether he had signed a card; and how he thought the Union would benefit him (A. 926, 943; 174-175, 191-192, 194-195). Scott said he felt the Union would be of help regarding benefits and money. During the same period Brower asked part-time employee Foreman if he had signed a card; why he was participating in the Union; and what he hoped to get out of it. Foreman said that the Union was for

the benefit of the men; that it would benefit the part-time employees and he was participating for the money he thought it would bring. In response, Brower said suppose the Company did not agree with the Union's demands and decided to lay everyone off. Foreman said if the Company wanted to lay off employees, they would have to do so, but he was sticking with the Union (A. 926-927, 944; 220-236). On two occasions, Brower asked employee Flaherty if he was in the Union. Each time Flaherty said no (A. 927, 944; 254-255).

On September 9, Theodore Silverhorn, Regional Manager, came to the Smithfield store with District Manager Levine. Silverhorn asked employee Schneider what he thought about the Union. Schneider said he was for it. Silverhorn asked why, and Schneider said it was for money. Silverhorn then asked why Schneider had not come to him with his problems. Schneider said because he knew it would do no good. The following day, while Schneider was at the Fifth Avenue store, Levine engaged him in conversation about the Union. Levine asked why he had not been informed about the Union, whether employees Ball and McGonigle had signed cards, and whether other employees were involved with the Union.^{4/} Schneider told Levine that Ball and McGonigle had signed cards, and that except for a couple of men at the South Hills Village store, all employees at the Pittsburgh stores supported the Union. Levine asked

^{4/} Ball and McGonigle were employed at the Fifth Avenue store. As of August 28, 1975, Schneider, Ball & McGonigle were the only employees at the Fifth Avenue store (A. 816).

if Schneider understood what would happen if the men went out on strike, but Schneider made no reply (A. 927, 944; 288-289, 300-301).

At the Fifth Avenue store, on September 8, Levine called part-time employee McGonigle into his office and asked if he had signed a card and whether he'd attended Union meetings. When McGonigle said yes, Levine said that McGonigle should have asked his advice. Levine also asked what other employees had attended Union meetings. McGonigle mentioned the names of some employees. Levine asked what the men wanted, McGonigle said money (A. 928, 944; 312-319-321).

On September 9, Silverhorn and Brien, National General Manager, visited the South Hills store. Silverhorn called employee O'Neill to the backroom and asked how he felt about the Union. O'Neill said he was not interested in the Union because in his view the Union would do him no good (A. 928, 944; 330-332, 336-337).

In mid-August, Northway Mall store Manager Holleran asked part-time employee Furis if Koritsky had spoken to him about the Union. Furis said yes. About 2 weeks later Holleran asked Furis to speak to the part-time employees and point out that if the effort for the Union continued, the employees could lose the flexibility in their hours and bring about a reduction in the part-time work force (A. 959, fn. 2, 929; 422-445, 453-456). During the same period Holleran asked employee Koritsky what his feelings were about the Union and if he had signed a card. Koritsky admitted signing a card and said he was for the Union. Holleran asked if anyone else had signed, and Koritsky replied that everyone in the store

had signed (A. 929, 944; 420-421, 434-436). On September 8, Holleran engaged part-time employees Halliday and Corrigan in a discussion about the Union and asked what they wanted. Halliday said the men wanted improved commission rates, better hospitalization and other benefits. Holleran said the Union was part of the Mafia and if the Union business continued all part-time employees would end up being terminated. Holleran asked Halliday and Corrigan if they had joined the Union. Corrigan said he had, and gave his reasons for doing so (A. 928-929, 944; 344-345, 354, 382, 395, 399-400).

On September 2, Monroeville Mall store Manager Moran spoke to employee Osselburn about the Union and asked what was going on. Osselburn said that a majority of the employees had voted to have a union. Moran asked why, and Osselburn said it was money, pointing out that promised raises had not come through. Moran asked who started the Union and who was involved. Osselburn said he had no idea. About two weeks later Moran told Osselburn that he knew that Osselburn and Macko, another Monroeville Mall employee, were the ones who started the Union (A. 930, 945; 480-481, 484). In early September 1975, Moran told Macko that he had learned that Macko and Osselburn were the ones who started the Union, and that in doing so they "had stirred up a beehive." The following day, Brower, manager of the Smithfield store, asked Macko why they had started a union, and if they had any problem why they had not first taken the matter up with him. Moran stated that in proceeding as they did, the employees went about it the wrong way; and that the best thing they could

do was just drop the whole idea, because there was no way they could win (A. 930, 945; 492-494, 503-504).

C. The Company discriminates against employees in violation of Section 8(a)(3) and (1) of the Act

1. The discharge of all part-time employees

Prior to the events herein, for at least 14 years, the Company had staffed its stores in the Pittsburgh metropolitan area with full-time and part-time employees (A. 735, 759). The Fifth Avenue store employed one full-time and two part-time employees; Smithfield employed 3 full-time and 2 part-time employees; Northway Center employed one full-time and 4 part-time employees; South Hills employed 4 full-time employees; and, Monroeville Mall employed 2 full-time and 3 part-time employees (A. 937, 816). These 11 part-time employees were students or individuals who were employed full-time elsewhere. All worked a schedule of hours, most evenings and Saturdays, which permitted them to work for the Company when they were not otherwise engaged.

On September 18, 1975, all part-time employees were abruptly discharged by the Company. The part-time employees received no advance notice and they had never been aware of a Company policy requiring employment of only full-time salesmen. Either through phone calls or when reporting for work on September 18, the part-time employees were told of their termination (A. 81, 203, 223, 244, 312-313, 345, 367, 384, 446, 461, 471).

2. The discharge of Ronald Bakowski

Bakowski was initially employed by the Company as a full-time shoe salesman in May 1969, at the South Hills store (A. 931; 95). In late 1972 or early 1973, Bakowski voluntarily terminated his employment with the Company to work for another shoe store (A. 931; 97, 125). In October 1973, Bakowski was rehired by the Company and assigned to the Smithfield store (A. 931; 96-97, 125). Bakowski worked under the supervision of Store Manager Brower until his termination.

Bakowski first learned of the Union's campaign in July, when employee Scott approached him about signing a card (A. 931; A. 98). The conversation was interrupted and was not resumed until August 25, 1975, when, at Scott's request, Bakowski signed a card (A. 931; 101-102). Bakowski's last day of work was on Wednesday, August 27, 1975. Thursday, August 28, was his day off, and Friday was the first day of his vacation period (A. 931; 103). Thursday afternoon, August 28, Bakowski called the store to find out if the pay checks were in. After finding out that they were, he went to the Smithfield store to get his check. Bakowski reached the store about 2 p.m. and remained there for approximately one hour. While in the store, Bakowski gave Brower the key to the premises, in accordance with usual practice, in case it should be needed while he was on vacation. After leaving the Smithfield store, Bakowski cashed his check and went to the Fifth Avenue store (A. 931; 104-106). Bakowski was at the Fifth Avenue store for about 2 hours talking with employees Ball and McGonigle (A. 931; 105). Bakowski left with Levine, who was

going for his evening meal; Bakowski was going to get the bus home (A. 931; 106). While at the Smithfield and Fifth Avenue stores, neither Brower nor Levine said anything to Bakowski which would indicate that his job performance was unsatisfactory or that his discharge was contemplated (A. 931; 106).

The following day, Friday, August 29, Bakowski spent at home; he received no word from either Brower or Levine. Bakowski left town early the following day (Saturday), returning late on September 1, 1975.^{5/} On Tuesday morning, September 2, 1975, Bakowski received a note in the mail dated August 28, 1975, signed by Brower. The note stated that Bakowski was discharged because of his inability to change his "down" feelings with regard to his fellow employee and his job (A. 932, 833, 106-109).^{6/}

3. The discriminatory transfer of employee Macko

George Macko was employed in March 1971, as a full-time salesman at the Company's Monroeville Mall store, until his transfer to the Fifth Avenue store, effective September 20, 1975.^{7/} Macko, one of the three

^{5/} On August 30, Bakowski received a call from the store at his home. Bakowski's father returned the call and left a message that his son was out of town and could be reached upon his return on September 2 (A. 932, n. 19; 156-157).

^{6/} Scott and Foreman, employed at the Smithfield store, testified that on Saturday, August 30, 1975, Brower told them he was writing a letter to Bakowski. He gave them a handwritten letter to read and asked them what they thought of it. The Administrative Law Judge found that although dated August 28, the letter was not written until August 30, 1975.

^{7/} Macko is still employed at the Fifth Avenue store.

employees who met with union agent Best on March 26, 1975, signed a card on that day, and thereafter, solicited several other employees to sign cards. As noted above, in early September, store manager Moran told Macko that he and Osselburn had started the Union movement, and by doing so they had "stirred up a beehive (A. 935; 488-491).

On September 17, Paul Holmes, administrative assistant to Brien, National General Manager, telephoned Macko and asked him to come to the Smithfield store to discuss an important matter. When Macko arrived, Holmes told him that beginning on September 19 he would be working at the Fifth Avenue store. Macko asked if he had any choice; Holmes said he did have a choice and he should think the matter over and give Holmes his decision the next day. The next day Macko telephoned Holmes and stated that he would not accept the transfer. Holmes said that someone had to be in the Fifth Avenue store by the end of the week (A. 936; 494-498).

On September 19, Macko learned that all part-time salesmen were being terminated. During the latter part of that day, Holmes came to the Monroeville Mall store and spoke with Macko. Holmes told Macko that there was no way he could be kept at the Monroeville Mall store. Holmes said that his job was to put the right people in the right place, that Macko was already on the payroll at Fifth Avenue, and that he had to start working there the following morning. Macko told Holmes that because his elderly father was ill, if a problem arose, the Monroeville Mall store was near his home. Moreover, if he were transferred to the downtown store,

it would be inconvenient, as he did not drive a car. Pursuant to Holmes' directive, Macko reported for work at the Fifth Avenue store (A. 936; 496-499).

II. THE BOARD'S CONCLUSIONS AND ORDER

Based upon the foregoing, the Board found that the Company violated Section 8(a)(1) of the Act by interrogating employees concerning their union sympathies, activities and membership, and by threatening to discharge employees because of their union activities. The Board further found that the Company violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging all of its part-time employees, and by discharging Bakowski and transferring Macko. The Board further found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the exclusive representative of its employees in the appropriate unit.

The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Affirmatively, the Board's order requires the Company to reinstate Bakowski, Macko, and the 11 part-time employees and make them whole for any loss of pay they may have suffered by reason of the Company's discrimination against them. Further, the Board's order requires the Company to recognize and bargain with the Union, upon request, and to post the customary notices.

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY INTERFERED WITH, RESTRAINED, AND COERCED ITS EMPLOYEES IN THE EXERCISE OF THEIR STATUTORY RIGHTS, IN VIOLATION OF SECTION 8(a)(1) OF THE ACT

On the heels of the Union's demand for recognition, the Company acted in an effort to thwart the Union's organizational efforts. Thus, the Company's anti-union campaign encompassed a range of conduct that touched almost the total employee complement. Interrogation was conducted in an effort to determine which employees favored unionization, signed authorization cards, and attended union meetings. Employees were asked who started the Union, how the Union would benefit them, and why the Company was not informed about the attempted unionization of its employees. The termination of part-timers was threatened if they continued their support of the Union. Employees were interrogated in the store managers' offices, on the selling floors and in the backrooms of the stores. The interrogations also took place in the context of the discharge of 11 part-time and one full-time employee and the transfer of another full-time employee. Interrogation such as this, with the accompanying threats to terminate all part-time employees and the subsequent discharges, cannot be viewed as mere harmless inquiry.

This Court has held that employer interrogation concerning employee union activity is unlawful if it is coercive in light of all the surrounding circumstances. The relevant factors examined in determining whether particular conduct is inherently coercive are set forth in Bourne v. N.L.R.B.,

332 F. 2d 47 (C.A. 2, 1964);^{8/} however, that list was not intended to be exhaustive. Retired Persons Pharmacy v. N.L.R.B., 519 f. 2d 486, 492 (C.A. 2, 1975). Nor is it necessary that all five "indicia of coercive interrogation" be present in each case. N.L.R.B. v. Gladding Keystone Corporation, 435 F. 2d 129, 132 (C.A. 2, 1970).

Based on the evidence summarized supra, pp. 4-8, the Board found that the Company violated Section 8(a)(1) of the Act on 12 occasions by interrogating employees about Union matters. The Company does not contest nine of those findings, but only seeks to challenge the Board's findings with respect to three instances of interrogation. It focuses attention on the conversations between Regional Manager Silverhorn and employees Schneider and O'Neil and between Store Manager Holleran and employees Halliday and Corrigan. As related supra, p. 5-7, on September 9, 1975, Silverhorn and District Manager Levine visited the Smithfield store where Silverhorn asked Schneider what he thought about the Union. When Schneider said he was for the Union, Silverhorn asked him

8/ These factors include (332 F. 2d at 48):

1. The backgrounds, i.e., is there a history of employer hostility and discrimination?
2. The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
3. The identity of the questioner, i.e., how high was he in the company hierarchy?
4. Place and method of interrogation, e.g., was employee called from work to the boss's office? Was there an atmosphere of "unnatural formality?"
5. Truthfulness of the reply.

why. Schneider said that it was for the money. Silverhorn then asked why Schneider had not come to him with his problem; Schneider said because he knew it would not do any good. The same day, Silverhorn and National General Manager Brien were at the South Hills store where Silverhorn called O'Neil into the backroom and asked how he felt about the Union. O'Neil said he was not interested because the Union would do him no good. About September 8, Store Manager Holleran spoke to part-time employees Halliday and Corrigan about the Union, asking what they wanted and if they had joined. Holleran stated that the Union was part of the Mafia and if the union activity continued all part-time employees would end up being terminated. The Administrative Law Judge credited the testimony of the employees. Indeed, in the case of Halliday and Corrigan, Holleran was not called to testify, so their testimony stands uncontradicted.

The Board was plainly warranted in finding that on the three occasions in question, just as in the other instances of unlawful interrogation, the Company violated Section 8(a)(1). The Bourne test is clearly met, for the purpose of these instances of interrogation, as in the case of the others, was to undermine the Union's organizational effort. Silverhorn was a high company official whose responsibilities covered several states. Holleran, while a store manager, was the highest ranking official in that store. Further, the Company's hostility to the Union is evidenced by the coercive interrogation of virtually all its employees, 12 discriminatory discharges, and one discriminatory transfer.

The information sought could have been used as a basis for taking action against individual employees, and in fact discriminatory action was later taken with respect to 13 of the 22 unit employees. The Company took no steps to mitigate the impact of its questioning by assuring the employees that there would be no reprisals. Hence, when all the surrounding circumstances are viewed together, and the interrogation in question is viewed in the context of the Company's campaign against the Union, the unlawfulness of the Company's conduct is clear.

The Company's attempt to defend Silverhorn's and Holleran's conduct (Br. 54-59) is hardly persuasive in the face of its willingness to concede the illegality of the other nine instances of interrogation, for all of the incidents were part of its same anti-union campaign. Obviously, the Company was strongly opposed to the unionization of its employees, and Regional Manager Silverhorn's visit to the two stores, accompanied by other high management officials, and his interrogations of employees Schneider and O'Neil were part of the Company's overall anti-union design. Holleran's interrogation of the two part-time employees, in the course of which he threatened that all part-time employees would be terminated, falls in the same category. Nor is there any merit to the Company's assertion that these instances of interrogation do not meet the Bourne criteria of illegality. The cases the Company cites for this proposition (Br. 55) are wholly inapposite. In J.J. Newberry Co. v. N.L.R.B., 442 F. 2d 897 (C.A. 2, 1971), in marked contrast to this case, there were only two "isolated" conversations and there was no "background of anti-union animus."

of anti-union animus." 442 F. 2d at 901. Similarly in N.L.R.B. v. Monroe Tube Co., 545 F. 2d 1320 (C.A. 2, 1976), this Court held that the employer did not commit any other violations of the Act and that the two inquiries found by the Board to be unlawful were lawful when viewed "against the background of an intensive, but legal, anti-union campaign" (emphasis supplied). 545 F. 2d at 1328.

The Company's attempt to defend Silverhorn's and Holleran's conduct by attacking the Board's credibility findings is likewise unavailing. The Company seeks to rely (Br. 54) on Silverhorn's testimony that Schneider initiated the discussion with him about the Union, but the Administrative Law Judge discredited Silverhorn and specifically credited Schneider's testimony that Silverhorn initiated the conversation (A. 927, n. 7). The Company also suggests that Schneider should have been sequestered, but since he and Silverhorn were the only two parties to their conversation, and no else was involved, it is difficult to see how the failure to sequester Schneider could have affected his testimony. Since the Company fails to show any prejudice in this regard its contention carries no weight. See N.L.R.B. v. Stark, 525 F. 2d 422, 428, 431 (C.A. 2, 1975), cert. denied, 424 U.S. 967. Finally, the Company makes a baseless attempt to show error in the Board's finding that Store Manager Holleran coercively interrogated part-time employees Halliday and Corrigan (Br. 57-59). The testimony of the two employees was specifically credited by the Administrative Law Judge (A. 929, n. 10), and this determination is not impaired by the minor variances between the two versions of the incident that the employees related. Such

differences in the testimony of witnesses to the same event are not uncommon. Further, the testimony of the two employees is undenied, since Manager Holleran was not called as a witness by the Company. Hence, the Company has little standing to complain at this stage.

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS
A WHOLE SUPPORTS THE BOARD'S FINDING
THAT THE COMPANY VIOLATED SECTION 8(a)
(3) AND (1) OF THE ACT BY DISCRIMINATORILY
DISCHARGING AND TRANSFERRING ITS EMPLOYEES

The Board found that the Company violated Section 8(a)(3) and (1) of the Act when it discharged all its part-time employees, full-time employee Ronald Bakowski, and transferred George Macko to the Fifth Avenue Store. The only issue before the Court as to this aspect of the case is whether substantial evidence on the whole record supports the Board's finding that the discharges were motivated by anti-union reasons. See N.L.R.B. v. Midtown Service Co., Inc., 425 F. 2d 665, 670 (C.A. 2, 1970). Since the issue involved in Section 8(a)(3) cases is one of subjective intent, direct evidence is usually not obtainable, and discrimination can normally be proven only by the use of circumstantial evidence. See N.L.R.B. v. Link-Belt Co., 311 U.S. 584, 602 (1941); N.L.R.B. v. Melrose Processing Co., 351 F. 2d 693, 698 (C.A. 8, 1965); N.L.R.B. v. Revere Metal Art Co., 287 F. 2d 632, 633 (C.A. 2, 1961). As this Court has recognized, "Evidence of [motive] may consist both of direct testimony by the one whose motive is in question and of inferences of probability drawn from the totality of other facts." N.L.R.B. v. Park Edge Sheridan

Meats, Inc., 341 F. 2d 725, 728 (C. A. 2, 1965). We show below that substantial evidence supports the Board's findings that the Company violated Section 8(a)(3) and (1) of the Act.

A. The discharge of all part-time employees

The record fully supports the Board's finding that the Company's discharge of the 11 part-time employees was discriminatorily motivated. Thus, for at least 14 years prior to September 18, 1975, the five Pittsburgh metropolitan area stores had been staffed both by part-time and full-time employees. However, as soon as the Company received the Union's recognition demand, Company officials commenced extensive interrogation of employees concerning their union activity. Most of the part-time employees were coercively interrogated concerning their views about the Union, and some were warned that if they supported the Union, all part-time employees would be terminated (supra, p. 7). At the time of the Union's demand for recognition on August 28, it possessed 14 signed authorization cards in the unit of 22 employees. There were at that time 12 part-time employees, and 11 of them had signed cards for the Union (A. 937, 942, 955). The results of the interrogation conducted by its supervisors were not lost on the Company, for it was apparent that if it terminated the part-time employees as a group, the Company could deliver a mortal blow to the Union by effectively destroying its majority.

Before the Board, the Company attempted to show that the discharge of 11 part-timers in September 1975, was merely the implementation of a decision that had been made the preceding January. The National General Manager of

Florsheim Shoe Shops, Louis Brien, testified that in order to increase sales in the Pittsburgh stores, which were below the national average for all Company stores, it was decided early in January 1975 to replace all part-time employees in that city with full-time employees. According to Brien, he spoke to Area Manager Silverhorn about the matter and directed him to see that the decision reached was effectuated as quickly as possible. Brien and Silverhorn allegedly conversed a number of times thereafter about the subject, and the latter told Brien that the decision was to be implemented by District Manager Levine but that Levine was having difficulty locating full-time sales people in the Pittsburgh area. Silverhorn testified that he in turn spoke to Levine about the subject approximately 20 times, but the latter only gave excuses as to why Brien's order could not be carried out (A. 947, n. 47; 640, 651). According to the Company's witnesses, the termination of the part-time employees was finally accomplished in September, because that was when Brien and his assistant, Holmes, personally took charge of the matter. In the first weeks of September seven full-time employees were transferred to Pittsburgh from stores in other cities, and on September 18 the part-timers were terminated (A. 941).

The record shows that the part-time employees received no advance notice that they were to be terminated and they were unaware of any Company policy requiring employment of only full-time salesmen (supra, p. 8). Brien testified that the only official in Pittsburgh who he told of his decision to eliminate the part-time employees was Levine, and to the best of his knowledge Levine did not inform any other manager (A. 939, n. 41; 611-612).

However, as previously shown some of the part-time employees were told at the time they were interrogated that their adherence to the Union would result in termination of the part-time employees. These warnings are strong evidence of the Company's discriminatory design, and when viewed in light of the Company's conceded hostility to the Union and its resort to other unlawful conduct, provide strong support for the Board's finding that the part-time employees were unlawfully discharged.

The Administrative Law Judge discredited the Company witnesses who sought to explain the discharge of the part-time employees (A. 947). He concluded that no credence could be given to the Company's claim that Levine ignored Brien's orders for 8 months, although pressured frequently by Silverhorn to implement them, and that the plan to replace the part-time employees was only implemented when Brien took over personal direction--an action which, as the Board noted, "just happened to coincide with the Union's demand for recognition" (ibid). In its brief to the Court (pp. 8-9) the Company tries to make it appear that because Levine was the nephew of one of the Company's founders, he was able to disregard orders from his superiors if he was so inclined. The record shows, however, that Levine had been with the Company for many years, having worked for it in at least three cities--Chicago, Boston and Pittsburgh--and had worked for it in Pittsburgh on one previous occasion, prior to his current 14-year assignment in that city (A. 758-759). Moreover, even accepting the Company's version of the events herein, it appears that when Brien decided to implement the program of using full-time employees only, he had no hesitancy about removing the matter from Levine's hand and personally taking charge. It

thus appears from the evidence that Levine was not treated with any particular deference by the Company, and that he was subject to managerial policies and directives to the same extent as any other employee.

The Company also refers in its brief (pp. 9, 11, 27, 29) to certain payroll registers from its Pittsburgh stores dating from early 1975 which contain notations allegedly constituting "reminders to eliminate part-time help" (Br. 11). The Company contends that the Board's finding of discrimination with respect to the part-time employees cannot stand unless it is assumed that these records are "forged documentary evidence" (Br. 29). This contention is baseless, however, for even if the notations are genuine all they reflect is a managerial intention to reduce the amount of part-time help in certain instances, not to eliminate it entirely, as the Company did when it discharged all the part-timers. Finally, it is significant that the Company utilizes part-time employees at its stores in New York, Los Angeles and Atlanta (A. 600-601, 628-629). Obviously, the experience with part-timers cannot be entirely negative, or they would not be used by the Company at those locations. The contrasting treatment accorded the Pittsburgh stores, where the part-timers were totally eliminated as soon as the Union appeared on the scene, is further evidence of the Company's discriminatory motivation.

Based on his overall evaluation of the Company's witnesses, the Administrative Law Judge observed that "credulity has its limitations, and in my view one would have to be credulous indeed to believe that in a company like Florsheim Shoe Stores, which operates on a national scale, the National General Manager would sit by and watch his orders flaunted by the local

manager, and not take some very positive action against the latter" (A. 947). The Administrative Law Judge concluded that the Company's testimony as to "when and how the decision to terminate the part-time employees was made was concocted in the effort to establish legitimacy for these terminations when no legitimate reason in fact existed" (A. 948). We submit that this finding, as affirmed by the Board, is reasonable in light of the evidence presented. On the basis of the entire record, therefore, which shows ~~■~~ so clearly the Company's strong anti-union animus, and particularly in view of the timing of the action, the Board reasonably inferred that the discharge of the part-time employees was discriminatory and hence violative of Section 8(a)(3) and (1) of the Act.

There is no merit to the Company's final argument (Br. 38-41) to the effect that even if the Board properly found that the part-time employees were discriminatorily discharged, the Company should not be required to reinstate them to their former jobs as the Board's order requires. No citation of authority is necessary to show that reinstatement is the conventional and appropriate remedy for unlawful discrimination. Under the Board's order the Company is required to offer the part-time employees reinstatement to their former jobs, displacing if necessary individuals brought in to perform their work. This type of Board remedy for unlawful discrimination is customary and is entirely appropriate in the circumstances. Neither of the cases cited by the Company^{9/} is apposite here, because they each involved

^{9/} Trico Products Corp. v. N.L.R.B., 489 F. 2d 347 (C.A. 2, 1973);
N.L.R.B. v. Savoy Laundry, Inc., 327 F. 2d 370 (C.A. 2, 1964).

the discontinuance of work by a department or division of an employer's operations. By contrast, in this case the work formerly performed by the part-time employees is still being performed. No work has been eliminated--only the employees who performed the work. Therefore, the Board's order does not place an undue burden on the Company by forcing it to resume discontinued work.

B. The discharge of Ronald Bakowski

The Board's conclusion that Bakowski was discriminatorily discharged is supported by a number of significant evidentiary factors. As shown in the Counterstatement he was employed by the Company for 5 years until his discharge on August 30, 1975. The discharge came 5 days after he had signed a union authorization card and one day after the Company received the Union's demand for recognition. Further, it is undisputed that either on the same day that Bakowski was discharged, or the previous day, Brower, his store manager, unlawfully interrogated employees in the store about union activity (supra p. 4-5). The Company does not deny the illegality of Brower's conduct.

In concluding that Bakowski was unlawfully discharged, the Administrative Law Judge noted the Company's apparent attempt to falsify the circumstances surrounding the discharge. Thus, the evidence shows beyond dispute, and the Administrative Law Judge found, that the letter of discharge to Bakowski was written by Store Manager Brower on August 30, the day after the Company's receipt of the Union's recognition demand (A. 932, n. 19, 20). Yet the letter was backdated to August 28, in an attempt to make it appear that it was written prior to the Union's recognition demand, and before Brower had unlawfully interrogated the store's employees.

Even in its brief to the Court, the Company misstates the facts in defending Bakowski's discharge. Thus it states: "Bakowski signed an authorization card on August 28, his last day at work before a vacation, and the day before the union filed its petition" (Br. 20). However, the uncontradicted evidence shows that Bakowski signed the union card on August 25 (A. 931; 101-102, 831). The Company nevertheless seizes on this misstatement of fact, and relying on its discredited effort to show that the discharge letter was written on August 28, attempts to make it appear that Bakowski signed the union card and was discharged the same day, thus decreasing the likelihood of any causal connection between the two events (Br. 19). The fact, of course, that the Company has gone to such lengths to falsify the sequence of events surrounding Bakowski's discharge is strong evidence of an attempt to conceal the unlawful motivation for the action. See N.L.R.B. v. Milco, Inc., 388 F. 2d 133, 138-139 (C.A. 2, 1968); N.L.R.B. v. Lizdale Knitting Mills, Inc., 523 F. 2d 978, 980 (C.A. 2, 1975).

The Company's letter of discharge to Bakowski accused him of not getting along with his fellow employees, and in its brief to the Court the Company asserts that "Bakowski's supervisor had spoken to him about his fighting with other employees" and using abusive language (Br. 19). Bakowski's supervisor, however, was Store Manager Brower, and the Administrative Law Judge specifically noted the Company's failure to call him as a witness to support its allegations against the employee (A. 932, n. 20). It is settled, of course, that the production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse." Interstate Circuit v. United States, 306 U.S. 208, 225-226 (1939). See also N.L.R.B. v. A.P.W. Products Co., 316 F. 2d

899, 903 (C.A. 2, 1963). Instead of calling Brower as a witness, the Company sought to defend its discharge of Bakowski by relying on the testimony of District Manager Levine. The Administrative Law Judge observed that Levine "did not impress me as a credible witness" (A. 932, n. 20).

The evidence taken as a whole, the Board found, did not support the Company's claim that Bakowski was discharged for his alleged bad relations with fellow employees. Although there was some evidence of a personality conflict between Bakowski and Flaherty, the Administrative Law Judge observed that "Flaherty's demeanor while testifying convinced me that he had strong personal animosity against Bakowski" (A. 934, n. 23). Further, the Board found that the evidence relied on by the Company was not regarded by it to be "of sufficient seriousness to warrant disciplinary action against Bakowski, until after learning of the Union's demand for recognition" (A. 945-946). It is true, as the Company notes in its brief, that there is no direct evidence that the Company knew of Bakowski's union adherence (Br. 52-53). However, it is not without significance that just after Bakowski signed an authorization card, Store Manager Brower engaged in unlawful interrogation, in the course of which he questioned Flaherty, the employee with the strong personal animosity against Bakowski who was also anti-union (supra, p. 5). Whether it was through Flaherty or some other source that the Company learned of Bakowski's support for the Union or whether it merely believed him to be a union adherent is immaterial, since the evidence as a whole supports the Board's inference that the discharge was motivated by anti-union considerations. See N.L.R.B. v.

Pembeck Oil Corp., 404 F. 2d 105, 110 (C.A. 2, 1968), remanded on other grounds, 395 U.S. 828 (1969); N.L.R.B. v. Long Island Airport Limousine Service Corp., 468 F. 2d 292, 295 (C.A. 2, 1972). In reaching its conclusion regarding Bakowski's discharge the Board inferred that his discharge was "motivated by some consideration which [the Company] has purposely failed to reveal, and the only motive apparent from this record is that [the Company] thought that Bakowski was a force in the attempt to organize the employees, which effort had just come to [the Company's] attention" (A. 946). We submit that the inference drawn by the Board is reasonable and its finding that Bakowski was discharged in violation of Section 8(a)(3) and (1) of the Act should be affirmed by this Court. See, N.L.R.B. v. Marcus Trucking Co., 286 F. 2d 583, 592 (C.A. 2, 1961); N.L.R.B. v Coletti Color Prints, Inc., 387 F. 2d 298, 305 (C.A. 2, 1967).

C. The transfer of George Macko

Macko worked at the Monroeville Mall store as a full-time salesman for 4 1/2 years until the Company learned of his union activity. The record shows that Macko and Osselburn were the only two full-time employees at the Monroeville Mall Store, and that they were the ones who had initiated the union organizational effort by contacting Union Agent Best (supra, pp. 10-11). The three part-time employees at that store also signed cards for the Union. Early in September 1975, after the Union's demand for recognition had been received by the Company, Store Manager Moran told Macko that he had learned that Macko and Osselburn were the ones who started the Union and that in doing so they "had stirred up a beehive" (A. 493).

Although Macko had been employed at the Monroeville Mall store for 4 1/2 years, on September 17 he was abruptly told by Paul Holmes, assistant to National General Manager Brien, that beginning in 2 days, on September 19, he would be assigned to the Fifth Avenue store. Macko protested that the transfer would entail considerable inconvenience to him, and make it difficult to get home in an emergency to care for his elderly father who was ill. However, Macko was told that he would have to transfer to the Fifth Avenue store.

The abrupt and summary manner in which Macko was transferred, just after the Company learned that he had helped initiate the union activity, is strong evidence that the transfer was motivated by anti-union considerations. The Company's motive in transferring Macko is not difficult to discern. Store Manager Moran stated that he had learned that Macko and Osselburn had initiated the Union movement, so it was obviously in the Company's interest to separate the two ringleaders. The tactic decided upon for accomplishing this was to transfer Macko to the Fifth Avenue store. There he would be under the watchful eye of District Manager Levine whose office was in that store (supra, p. 3, n. 3). Macko was transferred rather than discharged, because he was a highly valued employee; the Company concedes that he was "the number one assistant manager in Pittsburgh" (Br. 21).

As we have seen, the Company's objective in transferring Macko was to break up the core of union support which was located at the Monroeville Mall store. Since, the transfer was made for an anti-union reason, the action was violative of Section 8(a)(3) and (1) of the Act, even though

Macko's weekly earnings were more after he was transferred than they had been previously. N.L.R.B. v. Southern California Associated Newspapers d/b/a South Bay Daily Breeze, 299 F. 2d 677 (C.A. 9, 1962). N.L.R.B. v. J.W. Mays, Inc., 356 F. 2d 693, 697-698 (C.A. 2, 1966).

III. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY REFUSED TO BARGAIN WITH THE UNION IN VIOLATION OF SECTION 8(a)(5) AND (1) OF THE ACT, AND THE BOARD'S BARGAINING ORDER IS AN APPROPRIATE REMEDY FOR THE COMPANY'S VIOLATIONS OF THE ACT

As shown in the Counterstatement, supra, pp. 3-4, the Board found that as of August 28, the Union had been validly designated as the collective bargaining representative by 14 employees out of 22 in an appropriate unit. On August 28, three additional cards were signed by employees, and they were received by the Union on September 2. Therefore, as of September 2, the Union had been validly designated as collective bargaining representative by 17 of the 22 employees in the unit. Accordingly, the Board properly found that by refusing to recognize the Union on and after August 29, the Company violated Section 8(a)(5) and (1) of the Act. The Board also properly concluded that a bargaining order was necessary to remedy the Company's unfair labor practices.

A. The Union's majority

In its brief to the Court (pp. 25-26, 46-51) the Company argues, as it did before the Board, that the Union's authorization cards are invalid, and that therefore the Union did not have a proper majority when it sought recognition and bargaining. As we show below, the Company's argument is without merit.

The record shows that the Union's authorization card is divisible into two parts by tearing along a perforated line (A. 942). The top portion of the card, entitled "MEMBERSHIP APPLICATION", is reserved for the employee's name, address, social security number, and similar information, and the name and address of his employer. This is followed by a space for the employee's signature and the date of signing.

In small print, to the left of the signature, the card reads:

I hereby make application for membership in the RETAIL CLERKS INTERNATIONAL ASSOCIATION and affirm that the above statements are true, and I agree that all moneys paid by me shall be forfeited and my membership declared void if they are not true. I authorize the RETAIL CLERKS INTERNATIONAL ASSOCIATION to represent me for the purposes of collective bargaining and handling grievances, either directly or through such local union as it may duly designate. [10/]

The bottom portion of the card, entitled "RETAIL CLERKS INTERNATIONAL ASSOCIATION--LOCAL UNION No. 1407 CHECK-OFF ASSIGNMENT AND AUTHORIZATION CARD," contains a statement whereby the employee assigns to the Union so much of his wages as may be necessary to pay his dues and assessments, authorizes the employer to remit such deductions to the Union, and limits the period during which the assignment is to be in

10/ Although the size of print used in the "authorization" portion of the Union's card is small, it is not illegible, as the reproduced cards contained in the appendix make it appear (A. 818-822, 829-831, 839-862). Since the print on this portion of the card was apparently distorted in the process of preparing the appendix, the original cards constituting the General Counsel's exhibits are being lodged with the Clerk's office, for the Court's use in the event it should care to examine them.

effect. This is followed by a place for the employee's signature and the date of signing.

The Company asserts that the print on the authorization portion of the Union card is so small that it conceals the fact that one of the purposes of the card is to designate a collective bargaining agent (Br. 25-26, 46-47). The Company's argument is baseless, however, for each employee who signed a card testified concerning the authenticity of his signature and the circumstances of his signing, and there is no evidence of any employee not understanding that the purpose of the card was to designate the Union as his bargaining representative. Moreover, even if the size of the print made the authorization portion of the card difficult to read, the card nevertheless serves as a valid designation of the Union as bargaining representative. For when an employee signs an application for membership in a union he impliedly authorizes it to represent him in collective bargaining. It is well settled that the Act requires "no specific form of authorization to the bargaining agent and an application for union membership implies authority to bargain." N.L.R.B. v. Consolidated Machine Tool Corp., 163 F. 2d 376, 378 (C.A. 2, 1947), cert. denied, 322 U.S. 824; Lebanon Steel Foundry Co. v. N.L.R.B., 130 F. 2d 404, 407 (C.A.D.C., 1942), cert. denied, 317 U.S. 659; N.L.R.B. v. Somerset Shoe Co., 111 F. 2d 681, 687 (C.A. 1, 1940); Ace Alkire Freight Lines v. N.L.R.B., 431 F. 2d 280, 283 (C.A. 8, 1970).^{11/} Moreover, the fact that the card used here also

^{11/} Since authority to bargain is implied from a union membership application form, the Company's case is not aided by its reliance on the business agent's testimony that he regarded the Union card as a membership application (Br. 26).

contained a detachable portion for use as a check-off authorization does not create any ambiguity as to the import of the card or impair its validity as a bargaining authorization. See N.L.R.B. v. Marsellus Vault & Sales, Inc., 431 F. 2d 933, 938-939 (C.A. 2, 1970); Byrne Dairy, Inc., v. N.L.R.B., 431 F. 2d 1363 (C.A. 2, 1970).

Each card signer testified as to the authenticity of his card and what he was told prior to signing. There is no evidence of misrepresentation by the Union concerning the purpose of the card. The Company claims (Br. 49-51) that 6 of the 17 cards obtained by the Union should not be counted because, according to the Company, there is some doubt as to whether the 6 employees concerned read the authorization portion of the card before signing. There is no evidentiary support for this claim by the Company, because the credited testimony of the employees shows that each understood that they were signing an authorization for the Union to represent them (A. 943). Further, it does not matter whether the employees specifically read or understood the authorization portion of the card, since as shown above, by signing membership applications they impliedly designated the Union as their bargaining representative. Nor does the Company advance its position by reliance on N.L.R.B. v. Stark, supra, 525 F. 2d 422. That case involved the question of whether there should have been sequestration of witnesses who were also alleged discriminatees and who were expected to testify concerning the same occurrence. In the instant case, the employees did not testify about the same event, but rather testified individually about the authorization cards that they each had signed.

Hence, the witnesses had no occasion to tailor their testimony, and there is no evidence that they did so. In view of the clear and unambiguous Union authorization cards that each employee signed, the Company has not shown that it was in any way prejudiced by the Administrative Law Judge's failure to put them under "the rule."

- B. The Board properly found a bargaining order to be an appropriate remedy for the Company's violations of the Act

In N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1969), the Supreme Court sustained the Board's remedial authority to issue a bargaining order in cases where, as here, the employer refuses to bargain with a union which has obtained authorization cards from a majority of employees in an appropriate unit, and commits unfair labor practices which "interfere with the (Board's) election processes and tend to preclude the holding of a fair election." 395 U.S. at 594. The Court indicated that in such cases, a bargaining order would be appropriate (1) where the employer's unfair labor practices are so "pervasive" and "coercive" that it is the only effective means of remedying those unfair labor practices, or (2) where the unfair labor practices, though less substantial, are nonetheless such that "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." Id. at 614. It is well settled, as this Court has noted, that "the determination of whether

unfair labor practices are of such a nature as to warrant the issuance of a bargaining order is for the Board and not the courts." MPC Restaurant Corp. v. N.L.R.B., 481 F. 2d 75, 79 (1973). Accord: N.L.R.B. v. Hendel Mfg. Co., 483 F. 2d 350, 353 (C.A. 2, 1973); N.L.R.B. v. International Metal Specialities, Inc., 433 F. 2d 870, 872 (C.A. 2, 1970), cert. denied, 402 U.S. 907.

In evaluating the Company's conduct, the Board noted that the unfair labor practices, "particularly the discharge of 12 of 22 employees in the unit, which in fact destroyed the union majority, were of such a grievous and passive character as to make the holding of a fair election extremely doubtful if not impossible. . . ." (A. 949). As shown supra, the Company's anti-union campaign included coercive interrogation accompanied by threats, and the subsequent mass discharge of all part-time employees, the discharge of Ronald Bakowski, and the discriminatory transfer of George Macko. All of these actions were part of a scheme to undermine employee support for the Union. We submit that the Board's issuance of a bargaining order in the circumstances presented here was a proper exercise of its authority under the Gissel ruling, and was well within the limits previously approved by this Court. N.L.R.B. v. Scoler's Incorporated, 466 F. 2d 1289, 1293-1294 (C.A. 2, 1972); N.L.R.B. v. V & H Industries, Inc., 433 F. 2d 9, 10 (C.A. 2, 1970); Byrne Dairy, Inc. v. N.L.R.B., supra, 431 F. 2d at 1364. On the record of this case, the Board properly found that the Company's refusal to bargain with the Union on and after August 29, 1975, constituted a violation of Section 8(a) (5) of the Act and warranted the issuance of a bargaining order.

CONCLUSION

For the foregoing reasons it is respectfully submitted that judgment should be entered enforcing the Board's order in full.

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May 1977.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE FLORSHEIM SHOE STORE COMPANY OF)
PITTSBURGH, PENNSYLVANIA AND THE)
FLORSHEIM SHOE STORE COMPANY OF)
MONROE, PENNSYLVANIA,)

Petitioner,)

v.)

NATIONAL LABOR RELATIONS BOARD,)

Respondent.)

No. 77-4046

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's
brief in the above-captioned case have this day been served by first
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Dated at Washington, D. C.

this 16th day of May, 1977.

